76-614

Supreme Court, U. S.
FILED
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MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1976

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BRIAN WILLIAM FIRTH, Appellant

v. NO. A-237

GORDON THOMPSON, et al, Justices of the Supreme Court of the State of Nevada, Appellees

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JURISDICTIONAL STATEMENT

Jerry Collier Lane
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JURISDICTIONAL STATEMENT

The text material hereinafter set forth appears in the order indicated by Supreme Court Rule 15, and is numbered accordingly.

1.(a). The disposition of this action in the lower federal courts was accomplished without written opinions.

(b)(i). This is a civil rights action for declaratory judgment brought pursuant to 28 U.S.C.A., Section 2201, 28 U.S.C.A., Section 1343(3), and 42 U.S.C.A., Section 1983.

(ii). The order, dated June 21, 1976, was entered June 21, 1976 by the United States Court of Appeals for the Ninth Circuit, and, in addition to affirming the judgment of the United States District Court for the District of Nevada theretofore entered on May 30, 1975 following a motion for relief from an order that had been entered on March 11, 1975, it contained a statement that no petition for rehearing would be entertained. The Notice of Appeal was filed September 17, 1976 in the United States Court of Appeals for the Ninth Circuit.

(iii). The statutory provision believed to confer on this court jurisdiction of the appeal is 28 U.S.C.A., Section 1254(2).

(iv). Cases believed to sustain the jurisdiction are: Aetna Casualty & S. Co. v. Flowers, 330 U.S. 464, 67 S.Ct. 798, 91 L. Ed. 1024; Butte & S. Copper Co. v. Clark-Montana Realty Co., 249 U.S. 12, 63 L.Ed. 447; Carr v. Zaja, 283 U.S. 52, 51 S.Ct. 360, 75 L.Ed. 836; Doran v. Salem Inn, Inc., 95 S.Ct. 2561; Dutton v. Evans, 400 U.S. 74, 91 S.Ct. 210, 27 L.Ed.2d 213; and Watson v. Employers Liability Assur. Corp., 348 U.S. 66, 75 S.Ct. 166, 99 L.Ed.635, reh.den. 348 U.S. 921, 75 S.Ct.289, 99 L.Ed.722.

(c). The questions presented by the appeal are:

Can a United States District Court circumvent its duty to decide the legal rights of the parties in a civil rights action brought under 42 U.S.C.A., Section 1983, pursuant to 28 U.S.C.A., Section 1343(3) seeking, under 28 U.S.C.A., Section 2201, a declaratory judgment of denial of due process and equal protection rights by the five justices of a state supreme court through promulgation and enforcement of a court rule in alleged excess of such court's rulemaking power and in alleged contravention of a state statute granting a substantive right to have constitutionality or validity of any state misdemeanor statute determined by the state supreme court?

In such action, is it error for a United States District Court to apply federal certiorari law rather than the state's certiorari law and from such application to conclude, without written opinion, that, "There is no statute of the State of Nevada that requires the Supreme Court of Nevada to grant such a petition; and if there were such a statute, it would be unconstitutional," when the precise issue before the district court was the construction of a Nevada statute that created a special statutory writ of certiorari of a scope restricted to the review of constitutionality or validity of misdemeanor statutes and which required the issuance, in contradistinction to the granting of the relief sought, of such writ, followed by a return and a hearing upon such return, for the purpose of determining the merits?

Did the United States District Court for the District of Nevada, once having been presented with a detailed semantical and syntactical analysis of a Nevada certiorari statute that the declaratory judgment petitioner sought to have construed in order to determine the legal rights of the parties thereunder, err in its failure to construe such statute, in its failure to issue a written opinion, in its failure to make findings of fact and conclusions of law, and in its issuance of an order that stated merely the court's judgment that "There is no statute of the State of Nevada that requires the Supreme Court of Nevada to grant such a petition; and if there were such a statute, it would be

unconstitutional," which conclusion followed the court's application of federal certiorari law rather than Nevada certiorari law?

Did the district court err in concluding, without written opinion, that, "It appears that in three instances the Supreme Court of Nevada denied a petition for a writ of certiorari. There is no reason to believe that the denials were not made because upon review of the petition the Supreme Court believed on the face of each petition they were without merit," when, under Nevada law, the merits of a petition for the special statutory writ of certiorari are not reached upon its filing or upon the issuance of such writ, but only upon the return and hearing upon the return of such writ?

Did the district court err in its failure to issue any written opinion or otherwise indicate, with either generality or specificity, any refutation of the points and authorities or the legal analysis contained in Appellant's brief filed January 28, 1975?

(d) Statement of the case. This action for a declaratory judgment, pursuant to 28 U.S.C.A., Section 2201, upon grounds existing under 28 U.S.C.A., Section 1343(3) and 42 U.S.C.A., Section 1983, for the purpose of determining a question of actual controversy between the parties.

Prior to 1939, Nevada jurisprudence offered no procedure by which the constitutionality or validity of a statute or ordinance could be passed upon by the highest court of the State, the Supreme Court of the State of Nevada, in cases that arose in a justice's or municipal court and were appealed for a trial de novo in a Nevada district court, the district courts having final appellate jurisdiction in such cases by virtue of Article 6, Section 6, of the Constitution of the State of Nevada.

In 1939, the Nevada Legislature created a special statutory writ of certiorari expressly limited in scope to the review of the constitutionality or validity of a statute or ordinance in the circumstances set forth in the preceding

paragraph. The 1939 statute was adopted as an amendment to the pre-existing certiorari statutes that had originally been adopted in 1911 and had remained unchanged during the interim. The said amendment of 1939 became designated as Paragraph 3 of Nevada Revised Statutes 34.020, and it reads as follows:

> "3. In any case prosecuted for the violation of a statute or municipal ordinance wherein an appeal has been taken from a justice's court or from a municipal court, and wherein the district court has passed upon the constitutionality or validity of such statute or ordinance, the writ shall be granted by the supreme court upon application of the state or municipality or defendant, for the purpose of reviewing the constitutionality or validity of such statute or ordinance, but in no case shall the defendant be tried again for the same offense."

In the thirty-odd years that have elapsed since the adoption of the said remedial statute, no writ has been issued thereunder to a defendant, and only one to a prosecuting municipality, notwithstanding the mandatory language of the statute. The number of applications for such a writ during those years cannot be ascertained from the records of the Clerk of the Nevada Supreme Court. Appellant, however, has applied on three separate occasions since 1971, has received three denials of issuance, without written opinion, has applied three times for a rehearing, and has each time been denied. During such period, the Appellees, under the guise of promulgating court rules of procedure, have emasculated the substantive right granted by the statute.

Appellant has never had a day in court on the merits of any of his petitions, as contemplated by the statutes of Nevada, and has thereby been deprived of due process of law and the equal protection of the laws, as guaranteed under the 14th Amendment of the U.S. Constitution.

The Appellees, through abuse of their procedural rule-making power, have unconstitutionally metamorphosed Nevada's statutory certiorari rights, viz., issuance of the writ, return to the writ, and a hearing on the return in order to consider the merits of the petition, into certiorari proceedings like those found in a minority of the states, viz., the New England states, and in the Federal courts, i.e., proceedings in which issuance, return, and the merits are all considered in a single petition and hearing, thereby violating 42 U.S.C.A., Section 1983 and 28 U.S.C.A. 1343(3) as to Appellant.

The acts of Appellees are not the actions of the Nevada Supreme Court, but are instead the acts of the individual justices under color of law, in that the court, under the aforementioned constitutional and statutory provisions, was without authority to promulgate purportedly procedural rules which, in fact, deprive Appellant of substantive rights granted by the Nevada Legislature.

(e). Not applicable.

(f). Statement of the reasons why the questions presented are so substantial as to require plenary consideration.

For some five years, Appellant has been attempting, through the judicial system of the government of the State of Nevada, to secure exposition and clarification of two fundamental precepts of criminal jurisprudence, viz., (1) the identification and designation of the necessary elements of a crime, and (2) the classification of those elements into a dichotomy of (a) elements that must be proved by the prosecuting authority and (b) elements that may be presumed, all within the parameters of the Constitution of the United States and the Constitution of the State of Nevada.

Under Nevada law, misdemeanors are prosecuted in either justice's courts or, in the larger metropolitan areas, in municipal courts. Appeals from convictions thereof may be taken to the appropriate district court, wherein a trial de novo is held. Such district court is, by the

terms of the Constitution of the State of Nevada, the court of last resort with appellate jurisdiction for misdemeanors. However, the Nevada Legislature in 1939 created a new substantive and procedural right to a limited review, by the Nevada Supreme Court, of the constitutionality or validity of a misdemeanor statute upon the existence of certain conditions precedent set forth in such remedial statute. The special statutory writ of certiorari thereby created was separate and distinct from the classical discretionary writ of certiorari in that under the special statutory writ (1) the high court could not review errors of law or excesses of jurisdiction of the inferior tribunal, and (2) the language of the statute made the issuance of such writ, as distinguished from the granting of the relief sought by the petitioner, mandatory upon the existence of the statutory conditions precedent, which existence is readily determinable without any exercise of discretion by the high court. It was only upon the return to the writ, in writing or by oral argument, that the merits, i.e., the points, authorities, and argument in reference to the constitutionality or validity of the underlying misdemeanor statute were to be reached and decided by the Nevada Supreme Court.

Appellant attempted three times, in three different cases, to avail himself of the aforementioned substantive right, and in each case his petition was denied, without opinion, and without other explanation of the court's rationale; and in each case his timely petition for rehearing was denied, without opinion. To this date, Appellant has never been afforded a day in court for a hearing on the merits as to the constitutionality or validity of any statute under which he had been convicted. Following the third such attempt, Appellant petitioned the United States District Court for the District of Nevada for a declaratory judgment as to the legal rights of the parties. That court, in denying Appellees' motion to dismiss, found, inter alia, that the doctrine of judicial immunity would not preclude the granting of declaratory relief, that a substantial controversy involving adverse legal interests existed, and that

the seeking of declaratory relief only, was expressly authorized under 28 U.S.C.A., Section 2201. The Appellees, when ordered to answer Appellant's petition, set up several affirmative defenses that had already been considered and ruled upon by the federal district court in its order denying Appellees' motion to dismiss. The Appellees also asserted, as a Second Affirmative Defense, that the Nevada statute creating the aforementioned substantive and procedural right to have the constitutionality or validity of a misdemeanor statute determined by the Nevada Supreme Court was unconstitutional by virtue of the provision in the Nevada Constitution dealing with appellate jurisdiction of the state district courts; yet no written opinion has ever been handed down or published, in this case or any other, holding the said state statute unconstitutional.

Such conduct, i.e., depriving a person of a statutory right by having the justices of a state's highest tribunal, as respondents in a federal declaratory judgment action, argue to a federal court that the remedial state statute is unconstitutional, without such state's highest tribunal ever having ruled, or published a written opinion so declaring, is manifestly a deprivation of due process of law. Further, it should here be noted that no judgment of the Nevada Supreme Court is valid or is to be given any effect unless and until a written opinion in support thereof is on file with the clerk of such court, by virtue of the Constitution of the State of Nevada.

Appellees, in oral argument to the federal district court in Nevada, also urged that the said state statute was unconstitutional in that it was a violation of the separation of powers provision of the Nevada Constitution, notwithstanding the fact that Appellant's brief, then before such court, contained a detailed chronology and analysis of the Appellees' rulemaking power and their abuse of such power in emasculating a remedial act of the legislature without having had before them, sitting as the state's high court, any case raising the issue of the constitutionality of such act of the legislature, and thus, without having ruled thereon.

Appellees also misled the federal district court, at oral argument, into believing that an inherent power of Appellees, in their capacity as the supreme court, was limited or destroyed by the said remedial statute, when, in fact, no inherent power of Appellees was involved, but instead only their unauthorized exercise of power in frustrating, with no public announcement by written opinion or otherwise, a duly enacted state statute, thereby violating the separation of powers clause of the constitution and depriving the public of a substantive right to have the state's highest judicial tribunal rule upon constitutionality or validity of state misdemeanor statutes.

A particularly insidious consequence of such conduct of the Appellees is the realization that ordinary, and even extraordinary, techniques of legal research in behalf of all who come after this Appellant must fail in discovering that the justices of the Nevada Supreme Court have argued, in a federal forum, and succeeded, in having Nevada's remedial certiorari statute held unconstitutional through the clever device of persuading such court to first disavow the existence of such statute and to then add, hypothetically, that if such a statute existed, it would be unconstitutional. Research of annotations, digests, citators, and other reference works will find no references to Appellant's cases, because neither Appellees, acting as the state supreme court, in the three earlier cases brought by Appellant in that forum, nor the federal district court in the instant case, or the U.S. Court of Appeals for the Ninth Circuit in the instant case, cite NRS 34.020, Paragraph 3. No man, not even those trained in the law, can be presumed to know the law if both state and federal courts can repeal or alter, de facto, and without reported opinion, the legislative acts of a state, as has been done in the instant case.

As a collateral point, Appellant, as well as all other residents of Nevada, has been further deprived of due process of law in that Appellees, who are elected officeholders, have deprived the public of a substantive right granted by elected legislators, and have done so without public

proclamation, in contravention of the Nevada Constitution, and therefore in violation of due process rights.

Such a continuing course of conduct, violative of federal due process rights, can most logically be examined with optimum precision and adequate remedial power through the plenary consideration of the United States Supreme Court.

(g). Not applicable.

(h). No written opinions, reported or otherwise, were delivered upon the rendering of the judgment sought to be reviewed, nor were there earlier unreported opinions or companion opinions. Neither the United States District Court for the District of Nevada nor the U.S. Court of Appeals for the Ninth Circuit made findings of fact and conclusions of law.

(i). The judgment appealed from was announced by order as follows:

"UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIAN W. FIRTH,

Plaintiff-Appellant, No. 75-2778

v.

GORDON THOMPSON, et al.,

Defendants-Appellees.

BEFORE: WRIGHT, CHOY and GOODWIN,
Circuit Judges

Following oral argument, it was announced in open court that the judgment of the District Court is affirmed.

The mandate will issue at once and no petition for rehearing will be entertained."

In the upper righthand corner, the order bore a stamp indicating:

"FILED Jun 21 1976 EMIL E. MELFI, JR.
CLERK, U.S. COURT OF APPEALS"

Longhand initials, in ink, appeared above and to the right of "JR."

On May 30, 1975, the judgment of the United States District Court for the District of Nevada, affirmed on appeal, had been entered, and it read as follows:

"IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEVADA

BRIAN WILLIAM FIRTH, Civil No.R-2928BRT
Plaintiff,
vs.
GORDON THOMPSON, et al,
Defendants.

JUDGMENT

Responsive to the Motion for Relief from Order filed by plaintiff on April 2, 1975, the Court has reviewed the file and the briefs and has reaffirmed its conclusion that the Petition for Declaratory Judgment should be denied. Accordingly,

IT HEREBY IS ORDERED, ADJUDGED AND DECREED that plaintiff take nothing by virtue of the Petition for Declaratory Judgment and that the action be, and it hereby is, dismissed.

Dated: May 30, 1975.

/s/ bruce r. thompson
UNITED STATES DISTRICT JUDGE"

The original order of the U.S. District Court, entered on March 11, 1975, read as follows:

"IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEVADA

BRIAN WILLIAM FIRTH, Civil No.R-2928BRT
Plaintiff,
v.
GORDON THOMPSON,
et al.,
Defendants.

ORDER

This matter came on for hearing on March 7, 1975, at 1:30 o'clock P.M. Plaintiff and Plaintiff's attorney were not present. Attempts to contact Plaintiff's attorney were unsuccessful. At 2:00 o'clock P.M., defendants' argument was presented by their attorney, Patrick B. Walsh, Deputy Attorney General, appearing.

The court finds there is no reason to believe the denial of plaintiff's writs of certiorari to be for any reason other than lack of merit. The court is aware of no statute that forces the Nevada Supreme Court to issue a writ of certiorari if that court finds the petition lacking in merit. The court further finds that if there were such a statute, it would be unconstitutional.

Accordingly, IT IS HEREBY ORDERED that the petition for declaratory judgment be and it hereby is denied.

Dated: March 11, 1975.

/s/ bruce r. thompson
UNITED STATES DISTRICT JUDGE"

The foregoing was issued on legal cap bearing the text "Attorney General's Office, Carson City, Nevada" followed by a printer's logo with "103" beneath it, all in the lower left corner.

(j). The Notice of Appeal was filed in the U.S. Court of Appeals for the Ninth Circuit on September 17, 1976, and it read as follows:

"BRIAN WILLIAM FIRTH,
Appellant,
vs.
GORDON THOMPSON,
et al., Justices of the
Supreme Court of the State
of Nevada,
Appellees.

No. 75-2778
DC# CV-2928

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that BRIAN WILLIAM FIRTH, the Appellant above named, hereby appeals to the Supreme Court of the United States from the final judgment, affirming the judgment of the United States District Court for the District of Nevada, entered in this action on June 21, 1976.

This appeal is taken pursuant to 28 U.S.C. Section 1254(2)

/s/ jerry collier lane
JERRY COLLIER LANE
Counsel for Appellant

PROOF OF SERVICE

I, JERRY COLLIER LANE, ESQ., Attorney for Appellant herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that, on the 16th day of September, 1976, I served a copy of the foregoing Notice of Appeal to the Supreme Court of the United States on the Appellees thereto by mailing a copy, in a duly addressed envelope, with first class postage prepaid, to their attorney of record, Robert List, Esq Attorney General of the State of Nevada, Supreme Court Building, Carson City, Nevada 89701

/s/ jerry collier lane
Counsel for Appellant"

PROOF OF SERVICE

I, JERRY COLLIER LANE, ESQ., Attorney for Appellant herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that, on the 29th day of October, 1976, I served a copy of the foregoing Jurisdictional Statement on the Appellees by mailing a copy, in a duly addressed envelope, with first class postage prepaid, to their attorney of record, Robert List, Esq., Attorney General of the State of Nevada, Supreme Court Building, Carson City, Nevada 89701.

Jerry Collier Lane
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